IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No. 4711 of 2004

M/s Pralok Agencies ..Petitioner

vs.

1. Pimpri Chinchwad Municipal Corporation & others ..Respondents

Shri Shrihari Aney with Shri Bharat Joshi with Shri S.R.Ganbavale for petitioner.
Shri Jai Chinoy with Shri Deepak More i/b Shri A.J.Suryavanshi for respondents.

CORAM: A.P.SHAH AND
S.C.DHARMADHIKARI JJ
3rd NOVEMBER, 2004

P.C.

1. Heard Advocates.

2. By this petition, the petitioners seek to challenge the constitutional validity of clause (e) of Sub-section (2) of section 406 of the Bombay Provincial Municipal Corporation Acts, 1949 on the ground that it is violative of Articles 14 and 19(1)(g) of the Constitution. The petitioners are also seeking to quash the notices of demand of octroi dated 7th December, 2003 and 23rd December, 2003 issued by the Primpri Chinchwad Municipal Corporation. Briefly the facts are that the petitioners are carrying business of forwarding

agent and were holding Bonded Warehousing (Transport) Licence No.128 dated 16th January, 1991. The petitioners as a forwarding agent used to bring the goods belonging to their principal within the jurisdiction of the Corporation and used to store the goods in their warehouses till they receive instructions to further forward/despatch the goods as per the requirement of the principal. The licence issued to the petitioner was governed by Pimpri Chinchwad Municipal Corporation (Octroi) Rules, 2001, hereinafter for brevity's sake referred to as lthe "Octroi Rules" and Pimpri Chinchwad Municipal Corporation Octroi Standing Orders. Under the Rules it was obligatory for the petitioners to submit monthly statements to the Corporation giving factual position of import and export of the goods within the jurisdiction of respondent no.1. On 5th November, 2003 a raid was conducted on the petitioners' warehouses and it was found that there was large scale evasion of octroi duty. As a result the licence of the petitioners came to be suspended and the petitioners were called upon to pay the octroi duty to the extent of Rs.5,99,136/- The petitioners have filed a civil suit challenging suspension of the licence as well as demand notices issued by the Corporation. The petitioners, however, failed to get any interim

reliefs.

3. The petitioners have also preferred an appeal against the demand notices under sec.406 of the Bombay Provincial Municipal Corporation Act, 1949. Section 406(2)(e) provides that no such appeal shall be entertained in the case of an appeal against a tax or in the case of an appeal made against a rateable value the amount of the disputed tax claimed from the appellant or the amount of tax chargeable on the basis of the disputed rateable value, upto the date of filing the appeal has been deposited by the appellant with the Commissioner. The validity of the said provision is sought to be challenged on the ground that the condition imposed on the tax payer to deposit the entire amount makes the remedy of appeal completely illusory and is thus violative of Article 14. A distinction is also sought to be made between an appeal against the order fixing rateable value and appeal against the demand of octroi duty. It is contended that no adjudication takes place before the demand of octroi is issued. Therefore, so far as appeal against octroi duty is concerned, the remedy of an appeal is really in the nature of original proceedings and, therefore, the provision of

predeposit should not be made applicable to an appeal against the levy of octroi. In this behalf reliance is placed on the decision of the Supreme Court in Mardia Chemicals Ltd. Vs. Union of India; (2004) 4 SCC 311.

4. In our opinion, the petition is devoid of any substance. It is now well settled by a series of judgments of the Supreme Court that the provision of appeal will not be rendered unconstitutional merely because it provides for the deposit as a condition precedent for entertaining the appeal. In Anant Mills Co.Ltd. Vs. State of Gujarat (1975) 2 SCC 175, Supreme Court had an occasion to consider vires of Section 406(2)(e) of the Bombay Provincial Municipal Corporation Act, as amended by Gujarat Act 8 of 1968 to the entertainment of the appeal by a person who had not deposited the amount of tax due from him and who had not been able to show to the appellate Judge that the deposit of the amount would cause him undue hardship arising out of his own omission and default. The High Court had taken a view that there was a discrimination between an appellant who deposited the tax and an appellant who did not, which is the necessary consequence of the condition requiring deposit of the amount of tax, which was unreasonable and hit

by Article 14 of the Constitution. Khanna J. speaking for the Court observed as under:

> "The bar created by Section 406(2)(e) to the entertainment of the appeal by a person who has not deposited the amount of tax due from him and who is not able to show to the appellate Judge that the deposit of the amount would cause him undue hardship arises out of his own omission and default. The above provision, in our opinion, has not the effect of making invidious distinction or creating two classes with the object of meting out differential treatment to them it only spells out the consequences flowing from the omission and default of a person who despite the fact that the deposit of the amount found due from him would cause him no hardship, declines of his own volition to deposit that amount. The right of appeal is the creature of a statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the Legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of

any special reasons there appears to be no legal or constitutional impediment to the imposition of such conditions. It is permissible, for example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody before his a;appeal against the sentence of imprisonment would be entertained. Likewise, it is permissible ton enact a law that no appeal shall lie against an order relating to an assessment of tax unless the tax had been paid. Such a provision was on the statute book in Section 30 of the Indian Income Tax Act, 1922. The proviso to that section provided that "....no appeal shall lie against an order under sub-section (1) of Section 46 unless the tax had been paid." Such conditions merely regulate the exercise of the right of appeal so that the same is not abused by a recalcitrant party and there is no difficulty inn the enforcement of the order appealed against in case the appeal is ultimately dismissed. It is open to the Legislature to impose an accompanying liability upon a party upon whom a legal right is conferred or to prescribe

> conditions for the exercise of the right. Any requirement for the discharge of that liability or the fulfilment of that condition in case the party concerned seeks to avail of the said right is a valid piece of legislation, and *we can discern no contravention of Article 14 in it. A disability or disadvantage arising out of a party's own default or omission cannot be taken to be tantamount to the creation of two classes offensive to Article 14 of the Constitution, especially when that disability or disadvantage operates upon all persons who make the default or omission".*
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> (Emphasis supplied)

5. In Vijay Prakash D.Mehta/Shri Jawahar D.Mehta Vs. Collector of Customs (Preventive), Bombay,(1988) 4 SCC 402, the Supreme Court rejected the plea that the provisions laying down the condition of deposit of duty or penalty pending the appeal is ultra vires. The Court observed:

> "Right to appeal is neither an absolute nor an ingredient of natural justice the principles of which must be followed in all

judicial and quasi judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant."

6. Similar is the view taken by the Supreme Court in Shyam Kishore and others Vs. Municipal Corporation of Delhi and another; (1993) 1 SCC 22 the provisions of sec.170(b) of the Delhi Municipal Corporation Act requiring pre deposit of the amount of tax was held to be intra vires. In a recent decision in Gujarat Agro Industries Co.Ltd. Vs. Municipal Corporation of the city of Ahmedabad and others; (1999)4 SCC 468, it was held that pre condition of section 406(2)(e) (Gujarat Amendment) for depositing the amount of disputed tax or tax chargeable on the basis of the disputed rateable value is not constitutionally invalid. The Court observed that right of appeal is the creature of a statute and it is for the legislature to decide whether the right of appeal should be unconditionally given to an aggrieved party or it should be conditionally given. Right of appeal which is a statutory right can be conditional or qualified. It cannot be said that such a law would be violative of Article 14 of the Constitution. If the statute, does not create any right of appeal,

no appeal can be filed. There is a clear distinction between a suit and an appeal. While every person has an inherent right to bring a suit of a civil nature unless the suit is barred by statute, however, in regard to an appeal, the position is quite opposite. The right to appeal inheres in no one and, therefore, for maintainability of an appeal there must be authority of law. When such a law authorises filing of appeal, it can impose conditions as well.

7. We may also mention that Bharucha J. (as His Lorldship then was) in Elora Construction Company Vs. Municipal Corporationof Greater Bombay; A.I.R.1980 Bom.162 while dealing with the validity of sec.217 which is para materia with the provisions of section 406 held the provisions to be intra vires. We have, therefore, no hesitation in rejeting the challenge to constitutional validity of section 406(2)(e).

8. We are also not impressed by the submission that condition of predeposit cannot apply to appeals relating levy of octroi as such appeals are in the nature of original procededings. The submission is based on the decision in Mardia Chemicals Ltd. Vs. Union of India. In that case

the Supreme Court was considering the issue as to whether the remedy available under sec.17 of Securitisation Act is illusory for the reason that it is available only after action is taken under sec.13(4) and the appeal provided for under sec.17 is entertainable only on deposit of 75% of the amount under the notice of demand. The Court held that the provisions of requirement of deposit of 75% of the amount at the initial proceedings itself sounds unreasonable and oppressive, more particularly when the secured assets/the management thereof along with the right to transfer such interest has been taken over by the secured creditor or in some cases property is also sold. Requirement of deposit of such a heavy amount on the basis of a one sided claim alone cannot be said to be a reasonable condition at the first instance itself before start of adjudication of the dispute. Placed in a situation where it may not be possible for the borrower to raise any amount to make the deposit, his secured assets having already been taken possession of or sold, such a rider to approach the Tribunal at the first instance of proceedings, captioned as appeal, renders the remedy illusory and nugatory. The condition of predeposit is held to be bad rendering the remedy illusory on the grounds that (i) it is imposed

while approaching the adjudicating authority of the first instance, not in appeal, (ii) there is no determination of the amount due as yet, (iii) the secured assets or their management with transferable interest is already taken over and under control of the secured creditor, (iv) no special reason for double security in respect of an amount yet to be determined and settled, (v) 75% of the amount claimed by no means would be a meagre amount, and (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undermined demand. Such conditions are not only onerous and oppressive but also unreasonable and arbitrary.

9. We fail to appreciate how the ratio in Mardia's case can be made applicable to the appeal under sec.406 of the Bombay Provincial Municipal Corporation Act. The provisions of the Act read with octroi rules provide a complete scheme for levy, assessment and enforcement of Octroi. It, therefore, cannot be said that there is no prior adjudication and the appeal against levy of octroi is in the nature of original proceedings. In the aforesaid circumstances, no interference is warranted in exercise of jurisdiction under Article

226 of the Constitution. Petition is, therefore, dismissed.

10. Learned Counsel for the petitioner seeks stay of the recovery. Prayer for stay is rejected.